KOH HUAT KWAN v. PEGAWAI PENERIMA; (SELAKU PELIKUIDASI BAGI POH MAH HOUSING DEVELOPMENT SDN BHD) & ORS

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
VERNON ONG LAM KIAT JCA
ABDUL RAHMAN SEBLI JCA
[CIVIL APPEAL NO: A-03(IM)-123-10-2014]
16 JUNE 2015

COMPANY LAW: *Liquidation – Company wound up – Bank granted financing facilities to company – Company deposited original document of title of land to bank – Bank lodged lienholder's caveat over land – Consent order that liquidator would execute transfer to prospective buyer if sale price of land not less than prevailing market value of land – Land's market value was RM1 million but sold at RM1.2 million – Whether liquidator was party of sale and purchase agreement – Whether bank was enforcing claim as secured or unsecured creditor*

LAND LAW: *Caveat – Lienholder's caveat – Bank granted financing facilities to company – Company deposited original document of title to land to bank – Bank lodged lienholder's caveat over land – Consent order that liquidator would execute transfer to prospective buyer if sale price of land not less than prevailing market value of land – Land's market value was RM1 million but sold at RM1.2 million – Whether bank was enforcing claim as secured or unsecured creditor*

Pursuant to the grant of financing facilities by the third respondent, Affin Bank Bhd, to the second respondent, the latter deposited the original document of title to a piece of land ('the land') with the third respondent. The third respondent obtained judgment against the second respondent and subsequently lodged a lienholder's caveat over the land. The second respondent was wound-up pursuant to an order and the first respondent was appointed as the liquidator. A consent order was recorded in terms of the alternative prayer whereby it was agreed that the first respondent would execute the transfer form in Form 14A in favour of the prospective buyer of the land provided that the sale price of the land shall not be less than the prevailing market value of the land as valued by the Jabatan Perkhidmatan dan Penilaian Harta ('the JPPH'). A valuation report by the JPPH stated that the market value of the land was RM1 million. The third and fourth respondents entered into a sale and purchase agreement ('the SPA') under which the third respondent agreed to sell and the fourth respondent agreed to buy the land for RM1.2 million. Pursuant to the consent order the first respondent executed the transfer form in favour of the third respondent. The appellant lodged a private caveat against the land but the private caveat was ordered to be removed by the High Court on the application of the third respondent. The appellant then filed an application for leave to intervene in the proceedings and to set aside the consent order. The application was

dismissed and hence, the present appeal. The issues that arose in the present appeal were (i) whether the lienholder's caveat was enforceable; (ii) whether the first respondent was a party to the SPA; and (iii) whether the High Court had determined whether the third respondent was enforcing its claim as a secured or unsecured creditor.

Held (dismissing appeal with costs)
Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:

(1) The lienholder's caveat remained valid as it had not been removed or withdrawn. The plea of limitation affecting the enforceability of the lienholder's caveat was without merit. The disposal of the land was not a recovery process by a creditor. Limitation did not apply as the disposal of the land was, in essence, a disposal of the assets of the second respondent company in liquidation by a liquidator, as provided under s. 236(2) of the Companies Act 1965 ('the Act'). (paras 18 & 19)

(2) The appellant's argument that the first respondent was only a rubber stamp was unsubstantiated and without merit. The recital of the SPA clearly set out the background. Recital (1) expressly declared that the second respondent was the registered owner of the land and recital (2) stated that the first respondent had been appointed as the liquidator of the second respondent under a winding-up order made against the second respondent. In recital (3), the land is subject to a lienholder's caveat in favour of the third respondent and further, in recital (4) that by the consent order, the first respondent had consented to execute the transfer form in favour of any party identified as the purchaser of the land. It was further declared in recital (5) that the third respondent had obtained the first respondent's prior consent to sign the SPA. (para 20)

(3) The sale of the land was a disposal of the assets of a company in liquidation. The first respondent's conduct in disposing the land was nothing unusual. There was no evidence to support the appellant's complaint that the first respondent had acted fraudulently or that the first respondent's conduct was not *bona fide* in all circumstances. The principle that time stops to run when a company is in liquidation is quite settled. The commencement of a liquidation stops time running in favour of the creditors of a company. In other words, time under the Limitation Act 1953 ceased to run against a creditor on a winding-up order being made. (paras 21 & 24)

(4) Whether the third respondent was a secured or unsecured creditor had no bearing on the exercise of the power by the first respondent *qua* liquidator. If the third respondent was a secured creditor, the proceeds of the sale of the land would go towards discharging the property from the secured creditor *ie*, it will be paid to the third respondent. If the third respondent was an unsecured creditor, the proceeds will go to the respondent *qua* liquidator. (para 22)

(5) The appellant's real complaint was directed not at the sale of the land *per se* but his contention was that there was a buyer with a higher price. The sale of the land having exceeded the minimum price agreed upon by the parties, could not be said to be inadequate. Accordingly, the subsequent offer of a high bid should not be a ground for setting aside the sale as the price was adequate. If at all the first and third respondents had been negligent to have sold the land at RM1.2 million, it was for the appellant to bring the relevant action for damages for negligence and not to set aside the sale by the first respondent. (paras 22 & 23)

Bahasa Malaysia *Translation Of Headnotes*

Berikutan pemberian kemudahan pembiayaan oleh responden ketiga, Affin Bank Bhd, kepada responden kedua, responden kedua mendepositkan dokumen hak milik asal sebidang tanah ('tanah tersebut') kepada responden ketiga. Responden ketiga berjaya mendapatkan penghakiman terhadap responden kedua dan seterusnya memasukkan kaveat pemegang lien terhadap tanah. Responden kedua telah digulung berikutan satu perintah dan responden pertama dilantik sebagai pelikuidasi. Satu perintah persetujuan direkodkan iaitu permohonan alternatif bahawa dipersetujui yang responden pertama akan melaksanakan borang pindah milik dalam borang 14A bagi bakal pembeli tanah dengan syarat bahawa harga jualan tanah tersebut tidak kurang daripada nilai pasaran semasa seperti yang dinilai oleh Jabatan Perkhidmatan dan Penilaian Harta ('JPPH'). Laporan penilaian oleh JPPH menyatakan bahawa nilai pasaran tanah adalah RM1 juta. Responden ketiga dan keempat memeterai satu perjanjian jual beli ('PJB') di bawah mana responden ketiga bersetuju untuk menjual dan responden keempat bersetuju untuk membeli tanah tersebut dengan harga RM1.2 juta. Susulan perintah persetujuan, responden pertama melaksanakan borang pindah milik bagi responden ketiga. Perayu memasukkan kaveat persendirian ke atas tanah tersebut tetapi kaveat persendirian tersebut diarahkan untuk dikeluarkan oleh Mahkamah Tinggi atas permohonan responden ketiga. Perayu kemudiannya memfailkan permohonan bagi kebenaran untuk mencelah dalam prosiding dan mengenepikan perintah persetujuan tersebut. Permohonan tersebut ditolak dan dengan itu, rayuan ini. Isu-isu yang timbul dalam rayuan ini adalah (i) sama ada kaveat pemegang lien boleh dikuatkuasakan; (ii) sama ada responden pertama adalah pihak dalam PJB; dan (iii) sama ada Mahkamah Tinggi telah memutuskan sama ada responden ketiga menguatkuasakan tuntutannya sebagai pemiutang bercagar atau tidak bercagar.

Diputuskan (menolak rayuan dengan kos)
Oleh Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:

(1) Pemegang lien kaveat kekal sah kerana ia tidak dikeluarkan atau ditarik balik. Pli had masa yang memberi kesan kepada penguatkuasaan kaveat pemegang lien adalah tanpa merit. Pelupusan tanah bukan proses pemulihan oleh pemiutang. Had masa tidak terpakai kerana pelupusan

A tanah adalah, pada asasnya, satu pelupusan aset-aset syarikat dalam likuidasi responden kedua oleh pelikuidasi, seperti yang diperuntukkan di bawah s. 236(2) Akta Syarikat 1965.

(2) Hujahan perayu bahawa responden pertama hanyalah cop getah tidak berasas dan tidak bermerit. Fasal permulaan pada PJB jelas menyatakan B latar belakangnya. Fasal (1) jelas mengisytiharkan bahawa responden kedua adalah pemilik berdaftar tanah dan fasal (2) menyatakan bahawa responden pertama telah dilantik sebagai pelikuidasi responden kedua di bawah perintah penggulungan yang dibuat terhadap responden kedua. Dalam fasal (3), tanah tersebut tertakluk kaveat pemegang lien bagi C responden kedua dan selanjutnya, fasal (4) bahawa menurut perintah persetujuan, responden pertama telah bersetuju untuk melaksanakan borang pindah milik bagi mana-mana pihak yang dikenal pasti sebagai pembeli tanah tersebut. Diisytiharkan selanjutnya dalam fasal (5) bahawa responden ketiga telah mendapatkan persetujuan responden D terlebih dahulu untuk menandatangani PJB tersebut.

(3) Jualan tanah tersebut adalah pelupusan aset-aset syarikat dalam likuidasi. Tindakan responden pertama dalam melupuskan tanah tersebut bukanlah sesuatu yang luar biasa. Tiada keterangan untuk menyokong aduan perayu bahawa responden pertama telah bertindak E menipu atau bahawa tindakan responden pertama tidak *bona fide* dalam kesemua hal keadaan. Prinsip bahawa masa berhenti berjalan apabila sebuah syarikat berada dalam likuidasi agak mapan. Permulaan satu-satu likuidasi memberhentikan masa daripada berjalan bagi pemiutang-pemiutang syarikat. Dalam kata lain, masa di bawah Akta Had Masa F 1953 berhenti daripada berjalan terhadap pemiutang apabila perintah penggulungan dibuat.

(4) Sama ada responden ketiga adalah pemiutang bercagar atau tidak bercagar tiada kaitan dengan penjalanan kuasa oleh responden pertama *qua* liquidator. Sekiranya responden ketiga adalah pemiutang bercagar, G hasil jualan tanah tersebut akan melepaskan hartanah daripada pemiutang bercagar iaitu ia akan dibayar kepada responden ketiga. Sekiranya responden adalah pemiutang tidak bercagar, hasilnya akan pergi ke responden *qua* liquidator.

(5) Aduan sebenar perayu tidak ditujukan kepada jualan tanah semata-mata H tetapi hujahannya adalah bahawa terdapat pembeli dengan harga yang lebih tinggi. Jualan tanah melebihi harga minimum yang dipersetujui oleh pihak-pihak, tidak boleh dikatakan sebagai tidak mencukupi. Oleh itu, tawaran susulan iaitu tawaran yang tinggi tidak sepatutnya menjadi asas untuk mengenepikan jualan tersebut kerana harganya I mencukupi. Sekiranya responden pertama dan ketiga cuai dalam menjual tanah tersebut pada harga RM1.2 juta, perayu sepatutnya memulakan tindakan yang relevan iaitu bagi ganti rugi untuk kecuaian dan bukan mengenepikan jualan oleh responden pertama.

Case(s) referred to:

Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor [2007] 7 CLJ 516 HC ***(refd)***

American International Assurance Bhd v. Coordinated Services L Design Sdn Bhd [2012] 1 CLJ 506 CA ***(refd)***

Director of Customs Federal Territory v. Ler Cheng Chye (Liquidator of Castwell Sdn Bhd) (In Liquidation) [1995] 3 CLJ 316 SC ***(refd)***

Dr KS Thangal v. State of Kerala [1968] AIR (Ker) 197 ***(refd)***

Harold M Pitman & Co v. Top Business Systems (Nottingham) Ltd [1984] BCLC 593 ***(refd)***

Khaw Poh Chhuan v. Ng Gaik Peng & Yap Wan Chuan & Ors [1996] 2 CLJ 185 SC ***(refd)***

Leon v. York-O-Matic Ltd [1966] 3 All ER 277 ***(refd)***

Mahadevan Mahalingam v. Manilal & Sons (M) Sdn Bhd [1984] 1 CLJ 286; [1984] 1 CLJ (Rep) 230 FC ***(refd)***

Manilal & Sons (M) Sdn Bhd v. Mahadevan Mahalingam & Anor [1986] 2 CLJ 2; [1986] CLJ (Rep) 26 PC ***(refd)***

Mercantile Bank Ltd v. The Official Assignee of the Property of How Han Teh [1969] 1 LNS 106 HC ***(refd)***

Paramoo v. Zeno Ltd [1968] 1 LNS 95 FC ***(refd)***

Perwira Affin Bank Bhd v. Selangor Properties Sdn Bhd & Ors [2010] 3 CLJ 45 CA ***(refd)***

Re A Debtor (No. 400 of 1940) Ex p The Debtor v. Dodwell (The Trustee) [1949] 1 All ER 510 ***(refd)***

Re Case of Taff Wells Ltd [1992] BCLC 11 ***(refd)***

Re General Rolling Stock Co Ltd, Joint Stock Discount Co's Claim [1872] 7 Ch App 646 ***(refd)***

Re Overmark Smith Warden Ltd [1982] 3 All ER 513 ***(refd)***

Taj Clay Works Ltd v. Official Liquidator [1960] AIR (AP) 429 ***(refd)***

Wong Yew Kwan v. Wong Yu Ke & Anor [2010] 2 CLJ 703 CA ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 236(2)(c), (3), 279
Limitation Act 1953, s. 21(1)
National Land Code, ss. 281(2), 331

Other source(s) referred to:

Halsbury's Laws of England, vol 7(3) (4th edn), p 1730
Halsbury's Laws of England, vol 28 (4th edn, Reissue), p 352

For the appellant - Raj Shankar; M/s Raj Shankar
For the 1st and 2nd respondents - Rosli Ahmad; SFC
For the 3rd respondent - SP Muthu Veloo; M/s SP Veloo & Co
For the 4th respondent - Rathimalar; M/s Rathi MG Assocs

[Editor's note: For the High Court judgment, please see Government Of Malaysia v. Poh Mah Housing Development Sdn Bhd; Affin Bank Bhd, Koh Huat Kwan & Symphony Paradigm Sdn Bhd (Applicants) [2015] 2 CLJ 375 (affirmed).]

Reported by Najib Tamby

A

JUDGMENT

Vernon Ong Lam Kiat JCA:

Introduction

[1] This is an appeal by the appellant, Koh Huat Kwan, against the B decision of the learned High Court Judge dismissing the appellant's application to set aside a consent order dated 26 June 2013 ("the consent order") entered into between Affin Bank Berhad (the third respondent) and the Official Receiver (the first respondent) acting as the liquidator of Poh Mah Housing Development Sdn Bhd (the second respondent).

C

[2] Pursuant to the grant of financing facilities by the third respondent to the second respondent, the second respondent deposited the original document of title to a piece of land held under GM5A, Lot No. 2859, Mukim Durian Sebatang, Tempat Ulu Sungai Serasid, Daerah Hilir Perak, Negeri Perak ("the land") with the third respondent.

D

[3] On 6 December 1989, the third respondent obtained judgment against the second respondent for RM1,575,984.41.

[4] On 12 July 1995, the third respondent lodged a lienholder's caveat over the land.

E

[5] The second respondent was wound-up pursuant to an order dated 26 May 1999 and the Official Receiver was appointed as the liquidator.

[6] On 29 April 2013, the third respondent filed an application ("the first application") for an order that one Daleep Singh of Rimbun Capital Sdn Bhd be appointed in place of the first respondent.

F

[7] On 20 June 2013, the third respondent filed another application to amend the first application by adding an alternative prayer whereby the first respondent has to execute the transfer form in favour of the prospective buyer of the land.

G

[8] On 26 June 2013, the consent order was recorded in terms of the alternative prayer whereby it was agreed that the first respondent will execute the transfer form in Form 14A in favour of the prospective buyer of the land provided that the sale price of the land shall not be less than the prevailing market value of the land as valued by the Jabatan Perkhidmatan H dan Penilaian Harta (JPPH).

[9] On 10 July 2013, the JPPH issued a valuation report stating that the market value of the land as at 8 July 2013 is RM1 million ("the JPPH valuation report").

I

[10] On 27 November 2013, the third respondent and the fourth respondent entered into a sale and purchase agreement ("the SPA") under which the third respondent agreed to sell and the fourth respondent agreed to buy the land for RM1.2 million; pursuant to the consent order the first respondent executed the transfer form in favour of the fourth respondent.

[11] On 13 December 2013, the appellant lodged a private caveat against the land. The private caveat was ordered to be removed by the High Court on 3 June 2014 on the application of the third respondent.

[12] On 30 May 2014, the appellant filed an application for leave to intervene in the proceedings and to set aside the consent order.

Decision Of The High Court

[13] The findings of the learned High Court Judge may be summarised as follows:

(i) it is not necessary to file a fresh action to set aside the consent order as the challenge is against the decision of the first respondent in agreeing to sign the transfer form as the appellant's application to challenge the exercise of the first respondent's powers is made under ss. 236(3) and 279 of the Companies Act 1965 (CA 1965);

(ii) the third respondent was entitled to register the lienholder's caveat after judgment was taken on the loan (see *Mercantile Bank Ltd v. The Official Assignee of the Property of How Han Teh* [1969] 1 LNS 106; [1969] 2 MLJ 196). The lienholder's caveat remains valid until withdrawn by the third respondent or cancelled by the Registrar or by court;

(iii) the plea of limitation is not relevant as against the first respondent. Time does not run against the first respondent where the disposal of the assets of the company in liquidation is concerned;

(iv) it has not been shown that the first respondent had acted fraudulently, or had in some way not exercised his discretion *bona fide*, or that the first respondent has done and/or is proposing to do something which was so utterly unreasonable and absurd that no reasonable person would do it (s. 236(2)(c) of CA 1965); and

(v) even though the sale by the first respondent is subject to confirmation by the court, the subsequent offer of a higher bid should not be a ground for refusing confirmation of the sale provided the price is adequate (see *Dr KS Thangal v. State of Kerala* [1968] AIR (Ker) 197 Kerala at p. 198; *Taj Clay Works Ltd v. Official Liquidator* [1960] AIR (AP) 429 Andra Pradesh).

A

Appellant's Submission

[14] Before us, learned counsel for the appellant submitted on the following grounds:

(i) the lienholder's caveat is unenforceable as it is time barred under s. 21(1) of the Limitation Act 1953 (LA 1953). The words "other charge on land" in s. 21(1) of the LA 1953 refers to other encumbrances such as an equitable charge or lien, statutory or equitable which arises as a result of depositing a title deed with the lender (see *Manilal & Sons (M) Sdn Bhd v. Mahadevan Mahalingam & Anor* [1986] 2 CLJ 2; [1986] CLJ (Rep) 26 PC; *Mahadevan Mahalingam v. Manilal & Sons (M) Sdn Bhd* [1984] 1 CLJ 286; [1984] 1 CLJ (Rep) 230 (FC)). Section 21(1) of the LA 1953 provides that no claim to recover monies secured by a charge can be brought after the expiration of 12 years from the date the right to receive the money accrued. It was contended that since the right to receive the money accrued from the date of the judgment which fell on 6 December 1989, the cause of action abated on 5 December 2011 (see s. 281(2) NLC; *Perwira Affin Bank Bhd v. Selangor Properties Sdn Bhd & Ors* [2010] 3 CLJ 45, 57 (CA));

(ii) the first respondent is only a rubber stamp as it is not a party to the SPA. The first respondent had relinquished his powers as the liquidator under s. 236(2) of the CA 1965. The first respondent had no basis to enter into the consent order. He has a duty to determine if the third respondent's claim under the lienholder's caveat is valid and enforceable. If so, the third respondent should apply for an order for sale. If not, the first respondent should have challenged the validity of the lienholder's caveat. The sale of the land is wrong and should be set aside and the land reverted back to the first respondent;

(iii) the first respondent's decision in refusing to sign the SPA but agreeing to sign the transfer form is perverse. At the High Court, learned counsel for the first respondent was correct in not resisting the appellant's application and leaving the matter to the court's discretion. As such, there was no reason for the High Court Judge to dismiss the appellant's application; and

(iv) the learned High Court Judge failed to determine whether the third respondent was seeking to enforce its claim as a secured or unsecured creditor. The third respondent has never filed a proof of debt with the first respondent. Therefore, the third respondent had at all material times conducted itself as a secured creditor *(Director of Customs Federal Territory v. Ler Cheng Chye (Liquidator of Castwell Sdn Bhd) (In Liquidation)* [1995] 3 CLJ 316, at p. 326).

B C D E F G H I

Decision

[15] At the outset, it is pertinent to note that the appellant's application to set aside the consent order is predicated on s. 236(3) and/or s. 279 of the CA 1965 which are as follows:

Section 236(3) reads:

> The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

Section 279 further provides as follows:

> Any person aggrieved by any act or decision of the liquidator may apply to the Court which may confirm reverse or modify the act or decision complained of and make such order as it thinks fit.

[16] We agree with the learned High Court Judge's observation that the reference to the word "court" would mean the "Winding-Up Court" and any application arising out of any matter in the course of a winding-up should be referred to the Winding-Up Court.

[17] By invoking either of the aforesaid sections of the CA 1965, the Winding-Up Court is only justified in interfering with the exercise of the powers, acts or decisions of the first respondent *qua* liquidator if the appellant can show that the conduct of the first respondent falls within the following categories:

(a) that the first respondent had acted fraudulently; or

(b) that the first respondent was not *bona fide* in his conduct; or

(c) that the conduct of the first respondent was so utterly unreasonable and absurd that no reasonable person would so act.

(see *Leon v. York-O-Matic Ltd* [1966] 3 All ER 277; *Harold M Pitman & Co v. Top Business Systems (Nottingham) Ltd* [1984] BCLC 593; *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor* [2007] 7 CLJ 516; [2007] 3 MLJ 571)

[18] On the first issue relating to the unenforceability of the lienholder's caveat, we agree with the learned High Court Judge's finding that the lienholder's caveat remains valid as it has not been removed or withdrawn. (see *Halsbury Laws of England*, vol. 28 (4th edn, Reissue) at p. 352; *Khaw Poh Chhuan v. Ng Gaik Peng & Yap Wan Chuan & Ors* [1996] 2 CLJ 185; [1996] 1 MLJ 761 (FC); *Wong Yew Kwan v. Wong Yu Ke & Anor* [2010] 2 CLJ 703; s. 331 National Land Code; *Paramoo v. Zeno Ltd* [1968] 1 LNS 95; [1968] 2 MLJ 230 (FC).

[19] In this connection, the plea of limitation affecting the enforceability of the lienholder's caveat is also without merit. The disposal of the land is not a recovery process by a creditor. On the facts of this case limitation does not apply as the disposal of land is in essence a disposal of the assets of the second respondent company in liquidation by a liquidator. This is as provided under s. 236(2) of the CA 1965 which reads as follows:

> (2) The liquidator may -
>
> …
>
> …
>
> (c) sell the immovable and movable property and things in action of the company by public auction, public tender or private contract with power to transfer the whole thereof to any person or company or to sell the same in parcels;

[20] As for the second and third issues, the recital to the SPA clearly sets out the background. Recital (1) expressly declares that the second respondent is the registered owner of the land and recital (2) states that the first respondent has been appointed as the liquidator of the second respondent under a winding-up order made against the second respondent. It is also declared in recital (3) that the land is subject to a lienholder's caveat in favour of the third respondent and further in recital (4) that by the consent order the first respondent has consented to execute the transfer form in favour of any party identified as the purchaser of the land. It is further declared in recital (5) that the third respondent had obtained the first respondent's prior consent to sign the SPA. We pause to add that the sale price of the land of RM1.2 million was not less than the prevailing market value of the land which was valued at RM1 million by JPPH. As such, the appellant's argument that the first respondent is only a rubber stamp is unsubstantiated and without merit.

[21] In all the circumstances of this case, we agree with the learned High Court Judge that the sale of the land is a disposal of the assets of a company in liquidation. The principle that time stops to run when a company is in liquidation is quite settled. The commencement of a liquidation stops time running in favour of the creditors of a company. In other words, time under the LA 1953 ceases to run against a creditor on a winding-up order being made (see *Halsbury's Laws of England*, vol. 7(3) (4th edn) at p. 1730; *Re General Rolling Stock Co Ltd, Joint Stock Discount Co's Claim* [1872] 7 Ch App 646, pp. 648 to 650; *Re Case of Taff Wells Ltd* [1992] BCLC 11; *Re Overmark Smith Warden Ltd* [1982] 3 All ER 513).

[22] The fourth and last issue relates to the argument that the learned High Court Judge failed to determine whether the third respondent was enforcing its claim as a secured or unsecured creditor. We do not think that this is a relevant issue for the simple reason that whether the third respondent is a secured or unsecured creditor has no bearing on the exercise of the power

by the first respondent *qua* liquidator. We agree with the submission of learned counsel for the third respondent that if the third respondent is a secured creditor, then the proceeds of the sale of the land would go towards discharging the property from the secured creditor ie, it will be paid to the third respondent. If the third respondent is an unsecured creditor, the proceeds will go to the first respondent *qua* liquidator. In essence, there is no bearing on the validity of the sale of the land. At any rate, we observe that the appellant's real complaint is directed not at the sale of the land *per se*; his contention is that there was a buyer with a higher price. The sale of the land having exceeded the minimum price agreed upon by the parties, thus it could not be said to be inadequate. Accordingly, the subsequent offer of a higher bid should not be a ground for setting aside the sale as the price is in the circumstances adequate.

[23] We also note that the learned High Court Judge had addressed the point where he opined that if at all the first respondent and the third respondent had been negligent to have sold the land at RM1.2 million, it is for the appellant to bring the relevant action for damages for negligence and not to set aside the sale by the first respondent.

[24] In concluding, we agree with the finding of the learned High Court Judge that the conduct of the first respondent in disposing of the land was nothing unusual. There is no evidence to support the appellant's complaint that the first respondent had acted fraudulently or that the first respondent's conduct was not *bona fide* in all the circumstances. Further, we find no merit in the complaint that the conduct of the first respondent was so utterly unreasonable and absurd that no reasonable person would so act (see *American International Assurance Bhd v. Coordinated Services L Design Sdn Bhd* [2012] 1 CLJ 506 (CA); *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Another* (*supra*); *Leon v. York-O-Matic Ltd* (*supra*); *Re A Debtor (No. 400 of 1940) Ex p The Debtor v. Dodwell (The Trustee)* [1949] 1 All ER 510; *Harold M Pitman & Co v. Top Business Systems (Nottingham) Ltd* (*supra*)).

[25] For the foregoing reasons, the appeal is dismissed with costs.